Nos. 16367 and 16368

In the United States Court of Appeals for the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RAYONIER INCORPORATED, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION OF THE UNITED STATES FOR REHEARING

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The decision of this Court was filed on October 26, 1960. By order of the Court, the time within which to file a petition for rehearing was extended to December 24, 1960. The Government suggests that these cases should be reheard *en banc,* primarily because of the conflict between certain critical holdings in this Court's opinion and rulings on the same issues in an earlier appeal of these cases.

STATEMENT

These actions were brought by appellants in the United States District Court for the Western District of Washington against the United States under the Federal Tort Claims Act to recover damages for property losses allegedly sustained by reason of the negligence of the United States in connection with a forest fire on the Olympic Peninsula of Washington in 1951.

In summary, the complaints alleged that the fire had been started on August 6, 1951, by a Port Angeles and Western Railroad train on its right-of-way which ran across the Olympic National Forest; that the United States Forest Service had entered into an agreement with the State of Washington to render fire protection in an area which included the land pertinent to this case; that the Government undertook to fight the fire, which spread first to a 60-acre tract and then to a 1600-acre tract; that the fire was brought under control within the 1600-acre tract by August 11, 1951, where it smoldered until September 20, 1951; and that on the latter date it escaped from that area onto lands including those of appellants. The complaints charged, so far as relevant to this petition, that the negligence of the United States consisted in general of failure to extinguish the fires by utilizing insufficient manpower, tools, equipment, water and supplies before the forest fire reached appellants' property.

(1) *Prior Proceedings.* On March 1, 1954, the district court dismissed the complaints with prejudice.

On September 1, 1955, this Court affirmed.[1] *Rayonier Incorporated* v. *United States,* 225 F. 2d 642; *Arnhold, et al.* v. *United States, et al.,* 225 F. 2d 650.

In affirming the dismissals, this Court held that, on the allegations viewed in terms of Washington law, the sole proximate cause of the damage to appellants' property was the recurrence of the fire on the 1600-acre tract, and that liability could not be predicated upon alleged acts or omissions of agencies of the Government occurring prior to the containment of the fire on that tract. 225 F. 2d at 644.

With respect to the liability of the United States for its asserted negligence in failing to prevent the spread of the fire from the 1600-acre area, the Court held that the Forest Service was fighting the fire in the capacity of public firemen, and that under the Supreme Court's decision in *Dalehite* v. *United States,* 346 U.S. 15, the Government was not liable under the Federal Tort Claims Act for failure to extinguish the fire. 225 F. 2d 645–646.

In *Rayonier Incorporated* v. *United States,* 352 U.S. 315, the Supreme Court vacated the judgments, holding simply that the United States could be held liable under the Tort Claims Act for negligence upon the part of its public firemen. It did not pass upon the appellate court's interpretation of Washington law regarding proximate causation. The cases were remanded to permit the district court to determine

[1] The panel of this Court which heard the prior appeal consisted of Judges Bone, Orr and Hastie. The unanimous opinion of the Court was written by Judge Orr.

"whether the allegations and any supporting material offered to explain or clarify them would be sufficient to impose liability on a private person under the laws of the State of Washington." *Id.* at 321.

(2) *Subsequent Proceedings.* After trial, the district court determined that, while the Government was negligent in its initial attack on the fire, this negligence was not the proximate cause of appellants' damage. The record shows (and Judge Boldt found), *inter alia,* that the fire was started on August 6, 1951, by a Port Angeles and Western Railroad (P.A.W.) locomotive on its right-of-way, which was a 100-foot strip running across certain forest lands on the Olympic Peninsula (Finding IV, R. 230); that on the same day, the fire spread to a 60-acre tract owned by the United States, and on August 7, 1951, it spread to a 1600-acre tract owned in part by the United States and in part by Fibreboard Products, Inc. (Finding IV, R. 230; Findings X and XI, R. 232–233); that the United States had entered into a cooperative agreement with the State of Washington pursuant to 16 U.S.C. 572 and R.C.W. 76.04.400, under which the Government was responsible for fire protection on all non-government owned lands material hereto (Finding V, R. 230); that the United States undertook to fight the fire, which, on August 10, 1951, was confined and controlled in the 1600-acre tract, where mop-up activities continued for the next 40 days (R. 198; Findings XI and XII, R. 233); and that in the early morning of September 20, 1951, an extraordinary concurrence of high temperature, low humidity and gale

force wind caused a flare up of the fire within the 1600-acre area and the rapid spread thereof out of control, with resulting damage to appellants' property (Finding XII, R. 233–234).

On the basis of its evidentiary findings, the district court made several crucial ultimate findings:

> (1) that, although the Forest Service had not exercised reasonable care in its initial attack upon the Heckleville fire, it was not established either (a) that, had such negligence not existed, the fire would have been contained in the 60-acre area, or (b) that there was any causal relationship between the negligence and the ultimate existence of fire in the 1600-acre area (Finding XVI, R. 234–235);
>
> (2) that the United States was not shown to have failed to use reasonable care in its fire fighting activities, or in any other respect, after August 7 (Finding XVII, R. 235);
>
> (3) that the sole proximate cause of the alleged damage to appellants' property was the unforeseeable and fortuitous combination of wind and weather conditions which occurred on September 20 (Finding XVIII, R. 235–236).

Pursuant to these findings, the district court concluded that no negligence of the United States proximately caused or contributed to any of the damages claimed by appellants; and it entered judgments dismissing the actions with prejudice. This Court has vacated the judgments and remanded the cases.

GROUNDS FOR REHEARING

Following a lengthy trial, the district court made detailed findings to the effect that it had not been

established that any negligence on the part of the United States was causally related to the damage to appellants' property. Without purporting to disturb the basic findings of the district court, this Court has reversed its judgments.

Crucial to this reversal is the Court's determination that the district court could not be deemed to have found that appellants had failed to establish that the negligence of the Government was a cause in fact of the damage. We respectfully submit, however, that such a finding was made and that, in his supplementary oral remarks, Judge Boldt expressly stated that he was of that view. If, notwithstanding Judge Boldt's comments, this Court remained in doubt as to the import of his findings, it should have at least given him the opportunity to resolve the doubt before holding, on the basis of its construction of the findings, that Judge Boldt erred in his application of Washington law.

Equally crucial to the result reached by this Court is its view of the Washington law pertaining to legal cause. This view is not only in error, but, more important, is plainly opposed to that of the panel of this Court which heard the prior appeal (and which included a Washington judge). The intra-circuit conflict should be eliminated by *en banc* consideration of the question.

1. This Court recognizes in its opinion that the determination of whether or not a breach of duty is a "cause in fact" of the asserted damage involves a finding of fact. But it does not accept, as such, what

we think can be considered only as a finding by the district court that the Government's negligence in its initial attack on the fire was not a "cause in fact" of appellant's loss. Rather, the opinion states (p. 4) that the Court does not "believe that the district judge could have ever intended to make any such finding," since the fire which caused the losses in question could be traced back to the Heckleville spot fire (Slip Op., p. 4). The Court failed to take into account, however, that the United States did not start that spot fire and that the question, therefore, is not whether, had there been no fire at all, appellants' property would have been damaged. When this consideration is given recognition, it becomes plain, we submit, that the findings reflect the district court's conclusion that "cause in fact" had not been proven, and that this conclusion was wholly warranted.

In order to establish "cause in fact," appellants were required under Washington law to show that the negligence of the United States was "a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted 'but for' the act in question." *Eckerson* v. *Ford's Prairie School Dist. No. 11,* 3 Wn. 2d 475, 482, 101 P. 2d 345.

So far as the matter of the liability of the United States is concerned, "the act in question" was the Government's conduct intermediate the start of the fire by the railroad and its control. Consequently, appellants clearly had the burden of proof to show

that the fire would not have been in the 1600-acre area had the Government not been negligent. It follows, contrary to this Court's ruling (Slip Op., p. 6), that the district court committed no "error of law" in requiring appellants to meet this burden as reflected in the court's Finding XVI (R. 235). And in stating in this finding that appellants had failed to carry such burden, the district court to all intents and purposes found that the Government's negligence was not a "cause in fact" of appellant's damage:

> Whether, or at what time and place the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area (R. 235).

Although there is no ambiguity in Finding XVI, reference to the following observation made by Judge Boldt at the time that appellants were arguing their motions for amendment of the findings is pertinent:

> In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during [the "initial fire period" on August 6 and 7]. I will readily agree that one per-

> son might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time. (R. 292.)

Plainly, appellants had not proved to the satisfaction of the district court that "but for" the negligence of the Government in its initial attack, the fire would have been extinguished. Accordingly, this Court's statement (Slip. Op., p. 6) that "[i]t is perfectly clear from the court's findings that, had the United States not been initially negligent the Heckleville spot fire would have been extinguished before it finally spread" was not warranted.

In sum, the judgments below were not susceptible to reversal on the ground that the district court had found "cause in fact" to have been established. Effect should have been given to the district court's expressed opinion that appellants had not shown that, had the Government not been negligent during the initial fire period, the damage would have been avoided (R. 292). It might be added that, if there could still have been doubt as to the import of Finding XVI, that doubt should not have been resolved in such a way as to call for the conclusion (reached by this Court on its construction of the finding) that an experienced Washington district judge erred in the interpretation and application of the law of his own State to the facts as found. At the very least, the district judge should have been af-

forded the opportunity to clarify any possible ambiguity in his factual determinations.

2. In any event, appellants had the burden of proving not only cause in fact but also proximate, or legal, cause. This Court has held that such cause existed. The district court, on the basis of evidentiary findings which were not disturbed by this Court, found to the contrary. More importantly, the panel which heard the prior appeal held that, in the circumstances of this case, proximate cause is lacking as a matter of law. As above noted, this intra-circuit conflict respecting the Washington law of causation in itself warrants rehearing *en banc.*

a. The district court recognized in its memorandum opinion (R. 181), that appellants had the burden under Washington law of proving not only negligence but also proximate cause. See *Wilson* v. *N.P. Ry. Co.,* 44 Wn. 2d 122, 265 P. 2d 815; *Evans* v. *Yakima Valley Transportation Co.,* 39 Wn. 2d 841, 239 P. 2d 336; *Carley* v. *Allen,* 31 Wn. 2d 730, 198 P. 2d 827. Consequently, it does not follow from the mere fact that the district court found negligence in the initial attack upon the fire that such negligence was the proximate cause of appellants' damage. Nevertheless, in its opinion (p. 4), this Court stated that "when the district court finds District Ranger Floe to be initially 'negligent', we take it he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of a fire loss." And, further (Slip Op., p. 6), that given such negligence, "it seems pointless to say

* * * his negligence was not the 'proximate cause' of the ultimate loss."

We submit that in joining negligence and proximate cause in this fashion the Court misconceives the applicable Washington law on both burden of proof and proximate cause. That the district court properly considered appellants' two-fold burden of proof is clear, since it found, (1) that appellants had failed to establish any "causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area" (Finding XVI, R. 235); (2) that there was no negligence "in mop-up or other firefighting activities after August 7" (Finding XVII, R. 235); and, (3) that the "sole proximate cause of the damages to [appellants] * * * was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (Finding XVIII, R. 235–236).

Further, the district court's statement that Floe knew or should have known that a fire in that area which was not extinguished might burn continuously and progressively in any direction (R. 232) was simply a finding of general foreseeability with respect to fire. It was not a finding of proximate cause; *i.e.,* that *after* the fire was confined and controlled, damage to surrounding property was reasonably foreseeable.

What is lacking here is the degree of proximity which must "exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question." See *Eckerson* v. *Ford's Prairie School Dist. No. 11, supra,* 3

Wn. 2d at 482. While no one would deny that there is a relationship between the fire started by the railroad and appellants' loss, this is not the test of the Government's ultimate liability. The Government did not start the fire. Nor was it Government negligence that permitted the escape of the fire from the 1600-acre area. For these reasons, the question is whether the Government's conduct on August 6th and 7th, intermediate the start and the control of the fire, was a "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produced the event, and without which that event would not have occurred." *Eckerson, supra,* at p. 482. Viewed in the light of this criteria, the Government's negligence was not the proximate cause of appellants' damage. We commend particularly to the attention of the Court the discussion of the Supreme Court of Washington in *Wilson* v. *N.P. Ry. Co., supra,* pages 126, *et seq.,* which case the district court cited in connection with its discussion of proximate cause (R. 181).

b. In their complaints, appellants alleged that the fire was contained and controlled in the 1600-acre area prior to the date upon which it spread to their property. On the prior appeal, a panel of this Court expressly held that, accepting this allegation as true, the sole proximate cause of the damage was the recurrence of the fire [225 F. 2d at 646]:

> * * * we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire,

> after reaching the 1600-acre tract, smoldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * *
>
> On [the alleged] facts liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Without saying so, the opinion of this Court now under consideration repudiates this flat holding of Judges Bone, Orr and Hastie. The evidence indisputably bears out the allegation that the fire was contained and controlled in the 1600-acre area. Consequently, under the prior ruling, the sole proximate cause of the damage was the recurrence of the fire. And the district court found (and its finding was not disturbed by this Court) that this recurrence was not occasioned by negligence upon the part of the Government but, rather, by extraordinary and unforeseeable weather conditions.

Moreover, in thus implicitly rejecting the view of the Washington law on proximate cause which was subscribed to in this case by two Washington jurists (Judge Bone on the earlier appeal and Judge Boldt in the court below), this Court did not refer to any Washington decisions dealing with proximate causation.

We respectfully submit that the proximate cause holding in the earlier appeal should be treated as the "law of the case", since it is entirely consistent with Washington law on proximate cause, and evidence subsequently presented does not require a different result. The fact that the Supreme Court vacated the judgment in *Rayonier Incorporated* v. *United States,* 352 U.S. 315, does not militate against this conclusion, since that Court did not purport to question the validity of that portion of Judge Orr's opinion which dealt with proximate cause. In any event, the patent intra-circuit disagreement which now exists should be settled.

CONCLUSION

For the foregoing reasons, it is respectfully urged that rehearing be granted *en banc* and that on further consideration the judgment of the district court be affirmed.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

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